APPEAL NO. 93162

At a contested case hearing held in (city), Texas, on January 28, 1993, the hearing officer,(hearing officer), considered the sole disputed issue, namely, whether the claimant had good cause for having failed to notify her employer of her injury within the time required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act) and determined that she did have good cause. Thereafter, on February 1, 1993, the appellant (carrier's attorney) submitted to the Texas Workers' Compensation Commission (Commission) his application for attorney's fees, and the hearing officer, by his order of February 11, 1993, approved attorney's fees in a reduced amount. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 152.2(g) and 143.3 (Rules 152.2(g) and 143.3), carrier's attorney has requested our review and specifically contests the hearing officer's failure to approve his request for fees for two and one-tenth hours of his time spent in travel to and from his law offices in Dallas, Texas, to the carrier's insured's (employer) place of business in (city), Texas, a round trip of 122 miles, to interview employer's safety manager, claimant's supervisor, and a witness. Claimant filed no response.

DECISION

Finding only harmless error by the hearing officer, we affirm the hearing officer's decision on attorney's fees for carrier's attorney.

The hearing record reflects that the sole issue was whether claimant had good cause for not timely reporting her work related low back injury of May 28, 1992, to the employer. The hearing officer's decision reflects that each party called one witness, namely, the claimant and her supervisor, and that each party introduced three exhibits. The carrier's exhibits were the Employee's Notice of Injury (TWCC-41) and various health insurance claims forms neither signed nor submitted by claimant but rather by claimant's health care providers, some of which were checked "no" in response to the question whether the condition was related to claimant's employment. The hearing officer's statement of the evidence indicates that both the claimant and her doctor thought her back pain after May 28th--the day she removed a jammed film rack (normally accomplished by two employees) and felt a sharp, stinging sensation in her lower back--was attributable to arthritis and degenerative joint disease until an MRI of July 7th revealed both herniated and bulging discs. When informed by her doctor on July 8th or 9th of the MRI results, claimant told him of the May 28th incident and on July 9th reported the injury to her employer. The hearing officer concluded that claimant had good cause for not earlier reporting her injury because she was unaware of the severity of the injury until advised by her doctor of the MRI results. That decision has not been appealed.

Article 8308-4.091 provides that attorney's fees paid for defending a workers' compensation claim must be approved by the Commission as being "reasonable and necessary," and that in determining whether a fee is reasonable, the Commission shall consider issues analogous to those listed in Article 8308-4.09(c). Such issues include the

time and labor required, the novelty and difficulty of the questions involved, the skill required to properly perform the legal services, the customary fee in the locale for similar services, the amount involved in the controversy, and the experience and ability of the attorney.

Rule 152.1(c) provides that the fee approved by the Commission shall be based on the attorneys time and expenses, subject to the guidelines and standards in the 1989 Act and the Commission's rules, and Rule 152.3(b) provides, in part, that in considering whether a defense counsel's fee is reasonable and necessary, the Commission shall also consider the guidelines set forth in Rule 152.4. Rule 152.4 states guidelines for maximum hours for specific services. These guidelines include 1 hour for the initial interview, setting up the file, basic research, and filing initial documents; 2 hours per month for client conferences; and, for the formal resolution of disputes of compensability (including research and preparation time), 2.5 hours for a benefit review conference (BRC), and 1.5 hours for a contested case hearing (CCH) (if necessary). Thus in this case, the maximum hours in the Rule 152.4 guidelines total 5 hours, plus 2 hours per month for client conferences, assuming carrier's attorney attended a BRC. Neither the file nor his application for fees reflect that he did, however.

Carriers' attorney submitted an application for attorney fees for 32.30 hours which reflected six-tenths of an hour at $145.00 per hour and 31.70 hours at $120.00 per hour for total fees of $3,891.00. The hearing officer's order of February 11, 1993, approved carrier's attorney's fees in the reduced amount of $2,373.90, together with $280.00 for expenses. Carrier's attorney's total billed time of 32.30 hours was constituted as follows: initial services consisted of 2.50 hours for the initial interview and setting up the file (1.6 hours approved), 3.3 hours for basic research (1 hour approved), and 1.4 hours for completing forms and documents (0.8 hours approved); client conferences consisted of one-half hour for telephone conferences (approved), and the contested 3.6 hours for travel to and from the employer's facility and meeting with witness (1.5 hours approved); and CCH time consisted of 21 hours for various services related to the CCH (15.5 hours approved). Thus, attorney fees for carrier's attorney were approved for a total of 20.9 hours vis-a-vis the guidelines maximum of 5 hours (including BRC attendance), plus 2 hours per month for client conferences.

Rule 152.4(c) provides that an attorney may request approval of more hours than those allowed by the guidelines but must demonstrate to the Commission's satisfaction "that the higher fee was justified by the effort to preserve the client's interest, or the complexity of the legal and factual issues involved." Apparently, an affidavit submitted by carrier's attorney to the Commission, which referred, in part, to his "interview and preparation of witnesses who testified at the hearing," satisfied the hearing officer in awarding fees substantially in excess of the guidelines' maximum hours. As already noted, the carrier presented only one witness.

We note that claimant's counsel submitted an application for attorney fees which reflected 7.5 hours of attorney time at $125.00 per hour and 1.5 hours of paralegal time at $50.00 per hour for total fees of $1,012.50, and no expenses. The hearing officer's order of February 10, 1993, approved the fee application without change. Claimant's attorney's total billed time was constituted as follows: initial services consisted of 1 hour; client conferences consisted of 1 hour; BRC time consisted of 2 hours for a BRC on September 29, 1992, and 2 hours for a BRC on November 11, 1992; and CCH time consisted of 1.5 hours for the CCH on January 28, 1993. Thus attorney fees for claimant's attorney were approved for a total of 7.5 hours, together with paralegal fees for 1.5 hours, vis-a-vis the guidelines maximum of 5 hours, plus 2 hours per month for client conferences.

On the carriers' attorney fee application are various notes, apparently made by the hearing officer when he reviewed the application, and among such notes is the comment "time for travel not allowed, only mileage." We find no such constraint in either the applicable statutory provisions or Commission Rules and do not endorse such comment. In Texas Workers' Compensation Commission Appeal No. 91010, decided September 4, 1991, the attorney fees approved by the hearing officer included 2 hours for travel time at the attorney's hourly rate. It may well have been that comment which prompted this appeal since it is restricted to the hearing officer's reduction of the 3.6 hours to 1.5 hours. While the hearing officer abused his discretion and erred in determining that an attorney's time spent in travel cannot be compensated, we find such error to be harmless in this case when we consider the record as a whole. Texas Power and Light Co. v. Hering, 224 S.W.2d 191, 192 (Tex. 1949).

Finding no reversible error on the part of the hearing officer in his approval of carrier's attorney's fees, we affirm the hearing officer's decision.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge